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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-192

MCKESSON CORPORATION,
Petitioner,

v.

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION, and OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,
Respondents.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF FOR RESPONDENTS ON REARGUMENT

Respondents submit this brief in response to the July 3, 1989 order of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a challenge to a 1985 Florida statute imposing a tax on the sale of alcoholic beverages. The statute established a general tax rate for each of several categories of beverages, but it also provided preferences for sales of beverages made from certain citrus, grape and sugarcane products. The Florida Supreme Court held that, by virtue of the preferences, the statute was invalid under the Commerce Clause, and it remedied the violation by ordering that the preferences be stricken from the statute. The court then went on to decide that

petitioner—a taxpayer that had paid at the general rates —was not entitled to a tax refund.

Petitioner now argues that a state court *must* provide a tax refund whenever a tax statute is held unconstitutional. We think that this view is simply incorrect. Even if a refund might be required under certain circumstances, *see, e.g., Carpenter v. Shaw*, 280 U.S. 363 (1930), we see no basis for a hard-and-fast rule that refunds are always necessary. Rather, the courts should proceed according to the circumstances of each case, weighing the nature of the violation, the nature and degree of any injury, and the likely impact of particular relief on government operations. If those factors are applied here, it is readily apparent that petitioner is not entitled to a tax refund.

1. The Commerce Clause is concerned primarily with the division of power between States and the federal government with respect to interstate commerce. *See, e.g., Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981). Although individuals may benefit from its restrictions, their interest is more indirect than those interests under provisions expressly designed to protect individual rights.

Businesses like petitioner have no absolute "right" to prevent States from aiding local enterprises. This Court, in fact, has made clear that States "may enact laws pursuant to [their] police powers that have the purpose and effect of encouraging domestic industry." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984). While the dormant Commerce Clause limits the methods by which States can pursue this goal, Congress remains free to authorize the use of means that would otherwise be unacceptable. *See Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648 (1981).

We think, therefore, that the Commerce Clause provides an especially weak basis on which to rest a claim

for retroactive relief. In addition, we think that, even by the standards of that clause, the grounds for the claim here are unimpressive. Petitioner cannot argue, for example, that the legislature attempted to tax subjects beyond its authority and that the State would be "unjustly enriched" in the absence of a tax refund. At most, petitioner can object that the statute was "underinclusive," *i.e.*, that the legislature should have applied the preferences to all sales or to none at all.

This Court has recognized on several occasions that litigants challenging statutes as "underinclusive" are not automatically entitled to more favored treatment. *See, e.g., Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980); *Stanton v. Stanton*, 421 U.S. 7 (1975). We do not believe that the principles of these cases are limited to the issue of prospective relief. Indeed, pointing out that even successful plaintiffs may be "deprive[d] . . . of any monetary relief," *Heckler v. Mathews*, 465 U.S. 728, 739 (1984), the Court appears to have recognized that state and federal courts may eliminate preferential benefits for the future without extending them to all in the past.

The analysis in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), is not controlling on the question of proper remedies for constitutional violations. Although petitioner at times seeks to rely on *Chevron*, the doctrine developed in that case deals with a different situation: whether a rule of law applies to the past as well as the future. Here, the issue is not whether the principles announced by the Florida Supreme Court apply to the past but whether, even if they do, petitioner must be given a tax refund. Like others complaining of "underinclusive" statutes, petitioner is simply not entitled to the relief that it seeks.

2. The remedy for a constitutional violation, in any event, should not exceed the extent of injury suffered. *See generally Milliken v. Bradley*, 433 U.S. 267, 280-81

(1977). A tax refund in this case would compensate petitioner for an injury that does not exist.

The plain fact is that petitioner paid the tax that it should have paid, no more and no less. Although others paid a lower tax on a small number of sales, there is no possibility that the legislature, to achieve equality, would have sacrificed the general tax in favor of the preferences. Almost all sales (approximately 98%) are taxed at the general rates, and an extension of the preferential rates to those sales would result in a grave loss of revenues. Indeed, had petitioner secured its injunction *prior to* the effective date of the tax, its liability would have been exactly the same.

The Florida court also noted that distributors like petitioner "pass on" the tax to the immediate purchasers. This observation is important for two reasons: first, as the court noted, it indicates that petitioner would obtain a "windfall" by receiving a refund of taxes that it has already shifted to other parties; second, it deprives petitioner of the basis of its cause of action. State law provides for a refund of taxes wrongfully exacted only if the taxpayer in fact bore the economic burden of the tax. *See State ex rel. Szabo Food Services, Inc. v. Dickinson*, 286 So.2d 529 (Fla. 1973).

Although petitioner frequently refers to the possibility that it suffered competitive injury, that speculation is irrelevant to this lawsuit. Petitioner itself states, in no uncertain terms, that it has brought suit for a tax refund, *not* damages for any other injury caused by the violation. Moreover, it is by no means clear that it could have sued for competitive injury. State law does not generally provide for claims of damages arising out of a legislative act. *See Trianon Park Condominium Ass'n v. City of Hialeah*, 468 So. 2d 912 (1985). It is likewise uncertain that federal law would supply a cause of action for damages under the Commerce Clause. And, regardless of the legal basis of the claim, it seems highly probable that the competitive injury—if, indeed, there is any at all—would be *de minimis*.

3. Both federal and state courts, in fashioning remedies, may properly take into account the possible effects of such remedies on the public interest. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971). The need for such attention seems especially compelling when the relief at issue involves retroactive claims on a state treasury. In such cases, the relief is not needed to bring a program into compliance with the Constitution, and it may have an unusually severe impact on state operations.

That is certainly the case here. To begin with, as previously noted, the State did not acquire any additional revenues as a result of the taxing scheme under review: to provide a refund, therefore, is not just a matter of returning money that should not have been taken at all. Furthermore, it should be obvious that the State does not have the funds on hand to pay out hundreds of millions of dollars in back claims. The State would thus be required to cut programs or impose far higher taxes in the future—all in a time of strong pressure on existing state budgets—to provide for the refunds.

Contrary to petitioner's arguments, it is not necessary to require such severe measures in order to deter state legislatures from violating the Commerce Clause. Even if the aim of aiding local businesses was improper in and of itself—which it is not—the penalty here would be wholly disproportionate to the offense. No legislature should be made to pay out truly enormous sums for granting tax relief to a handful of local producers. In addition, the Florida courts have proved highly sensitive to claims of discrimination under the Commerce Clause: those courts can use their injunctive powers to prevent repeated violations if the legislature does not turn to

subsidies or other permissible measures of achieving its goal.

We do not believe, however, that it would be acceptable to remedy the violation here by imposing retroactive taxes on distributors who sold products subject to the preferences. To levy such taxes now, on sales long since past, would mean that distributors could not "pass on" the taxes on those sales to the purchasers. As a result, unlike petitioner who did have that opportunity, the distributors now taxed would bear the full brunt of the tax even though they may have received little or no benefit from the preferences (which primarily benefit manufacturers). Whether or not that treatment would be "so harsh and oppressive" as to be unconstitutional, *see Welch v. Henry*, 305 U.S. 134, 147 (1938), it would plainly be unfair. There is no good reason to go to such lengths to avoid giving petitioner a refund that, in any event, it does not deserve.

ARGUMENT

Petitioner, in responding to the questions posed by this Court in its July 3, 1989 order, argues that a court must always provide a retroactive remedy for a violation of the Commerce Clause. Pet. Supp. Br. at 8-14. We find no such absolute principle either in the Commerce Clause itself or in any other provision of federal law. Rather, we believe, the question of proper remedy must be decided on a case-by-case basis, having due regard for the nature of the violation, the nature and extent of any injury, and the effects of possible remedies on state operations. *See generally Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977). A proper application of such factors will allow for retroactive relief to correct genuine injustice, without extending windfalls to undeserving litigants.

Our position, therefore, is not that a taxpayer could never obtain a refund of taxes paid under an unconstitutional statute. This Court on several occasions has indi-

cated that such relief may be available, even necessary. *See, e.g., Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239 (1931); *Carpenter v. Shaw*, 280 U.S. 363 (1930); *Ward v. Board of County Comm'rs of Love County*, 253 U.S. 17 (1920). But even if those cases are taken at full value, we submit that retroactive relief is *not* required where, as here, the taxpayer challenges only minor preferences under a general taxing scheme; the taxpayer would have paid exactly the same tax under an even-handed system; the taxpayer passed on the tax to its customers; the taxpayer suffered (if anything) a minimal competitive injury, for which it has not sought redress; and the relief sought by the taxpayer (as well as other possible retroactive relief) would cause serious disruption to state programs. Based on those circumstances, the Florida Supreme Court properly declined to award petitioner the tax refund it sought.[1]

1. *The Nature of the Violation.* It is important, at the outset, to review the precise nature of the tax at issue and of the violation found by the Florida Supreme Court. The tax itself is imposed upon the sale of alcoholic beverages within the State. *See* Fla. Stat. §§ 564.06, 565.12 (1985); Resp. Br. at 2-4. It is paid in virtually all cases by distributors of the beverages (Fla. Stat. §§ 561.50, 561.506, 565.13 (1985)), who provide a necessary link in the chain of supply between manufacturers and retailers.[2] The tax is remitted on a monthly basis, according to the amount of sales during the prior month. *See* Fla. Stat. §§ 561.50, 561.506, 565.13 (1985).

[1] In our opening brief, we have argued that the Eleventh Amendment bars this Court from ordering a tax refund in this case. Resp. Br. at 30-39. If this Court concludes that a refund is not required in any event, we believe that the Court need not reach the Eleventh Amendment issue. *See Patsy v. Board of Regents*, 457 U.S. 496, 515 n.19 (1982).

[2] State law prohibits manufacturers from selling directly to retailers. Fla. Stat. § 561.14 (1985).

There is no question that, had the State imposed the tax equally upon all classes of beverages, the tax would have been upheld. As we have previously noted, Resp. Br. at 9-10, the court below did not find that Florida lacked the power to tax distributors (like petitioner) on the sale of alcoholic beverages generally or that the rate of taxation, in and of itself, was impermissible. The fault in the statute was simply that the State had provided preferences, according to a sliding scale, for sales of beverages made from products commonly found in Florida.[3] These preferences, the court found, were forbidden by the Commerce Clause. J.A. 422. To cure the infirmity, the court then struck the preferences from the statute so that all sales within a particular category of beverages were taxed at the same rate.

The nature of this violation seems to us significant in several respects. To begin with, it is well-accepted that the Commerce Clause is a provision designed primarily to allocate power between the States and federal government, not to create personal rights. *See Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881 (1985); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 669 (1981); *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 537-42 (1949). Although individuals may benefit from enforcement of Commerce Clause principles, that indirect interest plainly stands on different footing from interests under other constitutional provisions, which are expressly intended to protect individuals from acts of government. It seems clear, for example, that the Fifth and Fourteenth Amendments would absolutely prohibit the States and the federal government from awarding tax exemptions based upon race or sex, yet it would seem en-

[3] The amount of the preferences declined as the amount of beverages sold increased. In every case, at a specified level of sales, the tax on products subject to the preferences would be identical to the tax on products not receiving the preferences. See note 13 *infra*. Examples of the sliding scales are set forth in footnote 2 of the initial Brief for Respondents at pages 3-4.

tirely within Congress' power under the Commerce Clause to grant (or allow States to grant) tax exemptions to local industries. *See generally Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 422-27 (1946); McCarron-Ferguson Act, 15 U.S.C. § 1011 *et seq.* Whatever may be the limitations placed on States by the dormant Commerce Clause, Congress retains the power to " 'confe[r] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy.' " *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 652 (1981) (quoting *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980)).

There is nothing, therefore, inherently wrong with efforts to assist local business, provided that the means chosen do not unduly interfere with free, national markets. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984) ("[n]o one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry"). Indeed, the Florida Supreme Court, though striking down the preferences in this case, made clear that the State could have pursued the same goal through other programs, including direct subsidies to local manufacturers. J.A. 428-29. For this reason, petitioner can claim no vested right to prevent the State from "encouraging domestic industry" (468 U.S. at 271), even though the effect would be to place products that it distributes at a commercial disadvantage. Its interest, at most, is in assuring that the form of such assistance does not create an improper burden on interstate commerce.

We do not dispute that it is appropriate to accommodate this interest by an injunction barring discriminatory preferences, and the court below has done so. But this type of claim offers weaker grounds for an award of retroactive relief. Given the costs and difficulties of achieving equality after-the-fact, see pages 20-22 *infra*, it makes sense to employ the strongest remedial medicine

where the aim of the legislature, or the basis of the discrimination itself, is most offensive to constitutional principles, not just where the legislature has been mistaken in its choice of means. In those cases the need to protect constitutional values, as well as to deter affronts to those values, is likely to be at its greatest. Though a matter of legitimate concern, a claim of discrimination under the Commerce Clause is nonetheless different from the types of discrimination that courts have traditionally subjected to the most rigorous scrutiny. *See, e.g., Craig v. Boren*, 429 U.S. 190 (1976); *Levy v. Louisiana*, 391 U.S. 68 (1967); *Loving v. Virginia*, 388 U.S. 1 (1967).

It is also significant that the violation here does not involve an attempt by the legislature to reach out and tax subjects beyond its authority. A claim for a tax refund—even under the Commerce Clause—might carry greater weight in a case where the legislature had imposed a tax with no legal basis whatsoever. *See Ward v. Board of County Comm'rs of Love County, supra*; *Carpenter v. Shaw, supra*. In that context, the validity of the tax itself is called into question: if it lacks the power to tax, the taxing authority has presumably taken money to which it has no right in the first place. Absent strong countervailing interests, it may well be reasonable to say that the taxing authority should give it back.[4]

The situation here, however, involves no such overreaching. The State had every right to require distributors of alcoholic beverages to pay a tax on beverage sales within the State. In fact, the State could have subjected peti-

[4] American Trucking Associations, Inc., in its brief as *amicus curiae*, refers generally to "the state's obligation to return money it had no right to exact in the first place." *Id.* at 23. But it is incorrect to assume that the payment of taxes by those denied an unlawful exemption is "money [the State] had no right to exact in the first place." Whether that characterization can be supported depends on the particular classifications established by the statute and the purpose of the overall taxing scheme. See pages 14-15 *infra*.

tioner and other distributors to *higher* taxes so long as it did not also include impermissible preferences for local products. By incorporating such preferences into the statute here, the legislature, in effect, erred by exercising too little taxing authority, not too much.

This Court has already indicated that, in cases of so-called "underinclusiveness," those challenging an unconstitutional discrimination are not automatically entitled to receive more favored treatment. *See* Resp. Br. at 10-13; *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980); *Stanton v. Stanton*, 421 U.S. 7 (1975). In *Stanton v. Stanton, supra*, a suit brought by a mother seeking additional child support for her daughter, the Court agreed that a State could not cut off support for girls at 18 and for boys at 21. It went on to say, however: "The appellant, although prevailing here on the federal constitutional issue, may or may not ultimately win her lawsuit." 421 U.S. at 18. In *Wengler v. Druggists Mut. Ins. Co., supra*, the Court, having struck down a presumption of dependence for widows but not widowers, did not grant particular relief but left it to the state courts to decide "whether the defect should be cured by extending the presumption of dependence to widowers or by eliminating it for widows." 446 U.S. at 152. The Court has "frequently entertained attacks on discriminatory statutes or practices even when the government could deprive a successful plaintiff of any monetary relief by withdrawing the statute's benefits from both the favored and the excluded class." *Heckler v. Mathews*, 465 U.S. 728, 739 (1984).

Petitioner dismisses these cases as involving only prospective relief, but this treatment is too offhand. Realistically, the only way that a successful plaintiff could be "deprive[d] of any monetary relief"—both past and future—would if the State eliminated the benefit for the future and left the past inequality unredressed. The only other alternative would be for the States to eliminate the

benefit for the past as well as the future, a process that would involve thousands of suits to recover payments retroactively from the mothers of boys (in *Stanton*) or from widows (in *Wengler*).[5] It is difficult to believe that, in saying that plaintiffs might not obtain monetary relief, the Court expected States to resort to such unlikely measures.[6]

Petitioner has also suggested that state courts, when choosing among remedial options, must follow the retroactivity analysis in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Resp. Supp. Br. at 15-17. As we have said before (Resp. Br. at 22-24), however, we do not think that the *Chevron* analysis is controlling on the issue of proper remedies for constitutional violations.[7] Here, for example, the question is not whether the decision of the Florida Supreme Court should be applied to the past or just to the future, but whether petitioner would be entitled to a tax refund in any event.[8] The answer to this

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[5] As we discuss later, this sort of relief, even if constitutional, will typically raise insuperable practical problems. *See* pages 24-26 *infra*.

[6] Last Term, in *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890 (1989), the plurality, after noting an argument by the State that any inequality in tax treatment would be cured by removing the tax exemption for religious publications, stated: "If Texas is right, *appellant cannot obtain a refund of the tax* it paid under protest." *Id.* at 896 (emphasis added). The plurality found that the appellant had standing only because it declined to anticipate what action the Texas courts would take "as a matter of state law to a finding that a state tax exemption is unconstitutional." *Id.* In this case, the state court has already cured the inequality by eliminating the preferences, and it has further held that petitioner is not entitled to a refund.

[7] At the same time that petitioner seeks to rely on *Chevron*, which recognizes that some decisions apply only prospectively, it also argues that a court must always grant retroactive relief. Whether or not these approaches are consistent, we think that neither is correct.

[8] The discussion in the text assumes for purpose of argument that the *Chevron* doctrine is applicable to decisions from state

question does not—and should not—turn primarily on whether the principle of law is a new or old one, but on whether the violation caused redressable injury and whether possible remedies are consistent with remedial principles under state and federal law. The *Chevron* test sheds, at best, an indirect light on that inquiry.

In short, we see no reason to award retroactive relief as a matter of course, without regard to the character of the constitutional violation. Regrettable though it may be, the fact is that, in setting up social welfare programs and in fashioning tax systems to fund them, legislatures will sometimes draw improper distinctions. When a classification is particularly virulent, or the injury especially severe in either kind or degree, it may be necessary to fashion retroactive remedies. But it makes little sense to apply the rule without the reason. To require retroactive relief for any and all constitutional violations simply goes too far.

2. *The Nature and Extent of Injury.* The protection of constitutional interests does not require remedies that go beyond actual injury. Where injunctive relief is at issue, therefore, this Court has emphasized that remedies should be remedial—that is, they should be aimed at restoring an injured party to the position that he should have occupied without the violation. *Milliken v. Bradley*, 433 U.S. at 280-81. Retroactive relief should do no more. Here, however, petitioner seeks relief for an injury that it did not suffer.

We stress again a basic fact: petitioner paid the same tax that it would have paid under a system that fully

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courts. *But see* Resp. Br. at 22; Initial Br. of National Conference of State Legislatures, *et al.* as *amici curiae* at 10-25. We have also indicated in our initial brief (Resp. Br. at 24-27) our reasons for believing why, even if *Chevron* did apply here, a ruling of "prospectivity" would be proper.

complied with the Commerce Clause.[9] Although petitioner seems to base its claim on an implicit assumption that equal treatment would lead to everyone paying taxes at the preferred rates, the assumption is clearly incorrect. The Florida Supreme Court eliminated any constitutional infirmity in the tax statute by simply striking the preferences themselves; yet, after it had done so, petitioner paid the same rate of tax as before.

It is hypothetically true, of course, that, to achieve equality, the State could have adopted a statute providing the preferred rates for all sales of alcoholic beverages; as a practical matter, however, the idea is inconceivable. As we noted in our opening brief (Resp. Br. at 4), the revenues from this tax amount to nearly $250 million each year, with approximately 98 percent coming from sales of beverages not subject to the preferences. Furthermore, the proceeds from this tax are the third largest source of revenue received by the State. No rational legislature could forego most of this revenue to preserve preferences for what are, in relative terms, a handful of sales. Favoritism or no favoritism, therefore, petitioner would pay the same tax.

We simply do not understand why, having paid no more tax than it should have, petitioner should now be entitled to get most of it back. This is not a case—indeed, it is the exact opposite of a case—in which the legislature has singled out a small number of taxpayers for a burden that it would not apply to taxpayers as a whole. That situation might be different: if the vast bulk of taxpayers pay a preferred rate, and if the constitutional defect is eliminated by extending the preferred rate to everyone, the taxpayer at least has a credible claim that it paid more than it should have. But there can be no such doubt here: by its injunction, the Florida Supreme Court has required that *all* sales be taxed at the rate paid by petitioner.[10]

Petitioner also does not stand in the shoes of those taxpayers seeking refunds who are able to show that a determination of unconstitutionality *before* they paid the tax would have saved them from liability. *See, e.g., Ward v. Board of County Comm'rs of Love County, supra*; *Carpenter v. Shaw, supra.*[11] Again, the case for claiming retroactive relief might be more appealing when money is paid and lost solely because of the timing of the lawsuit. But the facts here cut precisely the other way. If petitioner had obtained its injunction the day before the tax took effect, it would not have paid one penny less in tax. Its claim for a refund thus asks for much more than prompt injunctive relief would have achieved.[12]

The Florida Supreme Court further noted that distributors "pass on" the tax burden to their customers. J.A.

[9] It is worth noting that, during the period in question, petitioner was free to distribute products qualifying for the preferred rates. Although its decision not to do so does not disable it from objecting to the preferences, the fact that any injury was at least partially self-inflicted provides another ground for rejecting its claim for retroactive relief.

[10] The legislature effectively ratified that view in a later statute. *See* 1988 Fla. Laws Ch. 88-308, Section 12. There, the legislature specified that if the provisions in the new statute were held invalid—as they were (*see Ivey v. Bicardi Imports, Co.*, 541 So.2d 1129 (Fla 1989))—then the earlier statute *as modified by the Florida Supreme Court* should take effect.

[11] The Court in *Ward v. Board of County Comm'rs of Love County, supra*, put considerable emphasis on the fact that the county had coerced payment of the taxes by threats of foreclosure and sale. 253 U.S. at 24. In that case, there was no question that, if the taxpayers had been able to obtain injunctive relief in the first place, they would have had no obligation to pay the tax.

[12] This anomalous situation, in fact, would give taxpayers an incentive to delay suit as long as possible to allow the amount of the claimed refund to accrue. The absence of an injunction might cause some modest "competitive injury," but that injury—at least under taxing schemes like the one here—would be a small fraction of the taxes sought to be recovered. See pages 18-19 *infra*.

430. Petitioner thus finds itself in the position of asking not just for the return of taxes that it would have paid anyway, but for the recovery of taxes that it has already recovered from the next purchaser in the chain. The Florida court observed that "if given a refund, cross-appellants [including petitioner] would in all probability receive a windfall, since the cost of the tax has likely been passed on to their customers." *Id.*[13] To make matters worse, it is presumably those same customers (or their customers) that would absorb any higher taxes now levied to provide the "windfall" that petitioner seeks.

The fact that a tax has been "passed on" is of particular significance under state law. The State has provided for a refund of taxes under certain circumstances, but not if the taxpayer did not bear the financial burden of the tax. *See State ex rel. Szabo Food Services, Inc. v. Dickinson*, 286 So.2d 529 (Fla. 1973). The rule reflects the perfectly reasonable notion that businesses collecting sales taxes and similar taxes should not be able to obtain refunds when they have already been made whole at the time of sale. So far as we are aware, there is nothing in federal law that would make such a judgment invalid.

Petitioner has suggested, however, that, if it passed on the tax, it suffered some competitive injury. Pet. Br. at 42; Pet. Reply Br. at 18. The short answer to this assertion is that petitioner did not bring a suit for competitive injury. Indeed, petitioner has expressly disclaimed any intention to sue for damages rather than a "tax refund." Pet. Supp. Br. at 3 n.2 ("McKesson has not sought damages for Florida's violation of the Commerce Clause"); *id.* at 7 ("McKesson did not prosecute an action for damages for Florida's violation of the Commerce Clause"). Even if the speculation about competitive injury had a sound basis, therefore, it would have no bearing on this case.

The decision not to seek damages for any competitive injury is not a surprising one, given that such an action would raise serious questions. To begin with, it is not clear what the source of the cause of action would be. In this case, petitioner has claimed only to be pursuing a cause of action conferred by state law (Pet. Supp. Br. at 7); but, whereas the State has waived its sovereign immunity for *bona fide* claims for tax refunds, it has not done so for claims of damages arising from a legislative act. *See Trianon Park Condominium Ass'n v. City of Hialeah*, 468 So.2d 912, 918-19 (Fla. 1985). It is thus doubtful that petitioner could obtain damages for any loss of sales under state law.

The right to recover damages under federal law seems equally uncertain. Petitioner cannot rely on Section 1983 to supply its cause of action against these defendants, because that provision does not authorize suits against States or state officers in their official capacities. *See Will v. Michigan Dep't of State Police*, 109 S. Ct. 2304 (1989). Nor is it clear that claims under the Commerce Clause would fall within the scope of Section 1983 even in a suit against proper defendants. *See Private Truck Council of America, Inc. v. Quinn*, 476 U.S. 1129 (1986) (White, J., dissenting from denial of certiorari); *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139, 1144 (8th Cir.), *cert. denied*, 469 U.S. 834 (1984).

The American Trucking Associations, Inc. say that "there would nevertheless be a federal cause of action implied directly under the Commerce Clause." Brief of American Trucking Associations, Inc., *et al.* as *amici curiae* at 14. But there are several problems with this theory. Most notably, the Commerce Clause—unlike, for exam-

[13] We also question whether petitioner would have paid lower taxes even if it had been given the benefit of the preferences. Because the preferences are eliminated once sales reach a certain level, and because the products distributed by petitioner are more popular than the products subject to the preferences, the effective rate of tax would likely have been the same. *See* Resp. Br. at 27-28.

ple, the Fourth Amendment or the Fifth Amendment—is not a provision marking out individual "rights." *See* pages 8-9 *supra*. *Cf. Davis v. Passman*, 442 U.S. 228 (1979); *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). This Court has previously been willing to imply a cause of action directly under the Constitution for "the class of those litigants who allege that their own constitutional rights have been violated," *Davis v. Passman*, 442 U.S. at 242, but it is not at all clear that "third-party beneficiaries" under the Commerce Clause would fall into that class. Furthermore, even if the Court were willing to imply a cause of action for injunctive relief, it does not follow that it must allow claims for damages as well. *See id.* at 244 (existence of cause of action leaves open question "whether a damages remedy is an appropriate form of relief"). Although it may be necessary to permit suits for injunctive relief in order to end ongoing violations, a suit for damages against state officials is concerned entirely with conduct that is past. *See Papasan v. Allain*, 478 U.S. 265, 277-78 (1986). And, we think that the Court should be reluctant to subject state officers to suits for damages, especially in their *official* capacity, if Congress—to whom the power over interstate commerce was specifically granted—has not seen fit to do so.[14]

These legal questions aside, a claim based on competitive injury would also face severe factual difficulties. No one questions that, although some sales of alcoholic beverages in Florida were taxed at lower rates, the overwhelming majority of sales (an estimated 97-98%) were taxed at the same rates that petitioner paid. As a result, the only sales that petitioner (and all its competitors) could have lost by virtue of the higher taxes were

[14] The Court would also have to decide whether Florida could invoke its sovereign immunity against damage claims brought in state court. *Cf. American Trucking Ass'ns v. Conway*, 146 Vt. 579, 508 A.2d 408 (1986), *cert. denied*, 483 U.S. 1019 (1987).

the very small number taxed at the preferential rates. The basis of petitioner's suit, therefore, is nothing more than a speculative claim—held in common with all distributors of products not qualifying for the preferences—that some of the relatively few purchasers of local products would have purchased other products in the absence of the preferences.[15] It seems highly probable that any such effects on competition were, at most, *de minimis*.

We agree with petitioner, however, that the Court need not reach any of these difficult issues. What is abundantly clear is that, if petitioner suffered any competitive injury at all, its injury bears no relation whatsoever to the amount of tax payments that it made. The suit actually brought (for a tax refund) is not an equivalent, or even a near cousin, of the suit not brought (for damages arising out of competitive injury). The Florida courts properly addressed the form of relief that petitioner requested and determined, quite correctly, that petitioner was not entitled to it.

Lastly, we note that petitioner should not be permitted to bootstrap its way into a tax refund by employing an all-or-nothing strategy, *i.e.*, by suing for the wrong relief and then arguing that it is being turned away with nothing. Whatever may be the obligation of a State to provide *some* retroactive relief—and we think that there is no such absolute duty—it surely need not provide just any relief that a taxpayer chooses to ask for. To the contrary, a State is entitled to limit its remedial scheme to compensating those injuries actually suffered. Peti-

[15] Because petitioner would have paid the same tax on its sales even if the preferences had not existed—as, for example, it did after they were stricken from the statute—it has no claim that the existence of the tax itself caused potential purchasers not to buy at all. And, it cannot have lost sales to other distributors of non-preferred products because its competitors with regard to those products were (and are) subject to the same tax.

tioner, in its efforts to obtain a "windfall," has failed to meet that basic standard.

3. *The Effects of Proposed Relief.* Retroactive relief in this case, as in many other cases, would plainly cause serious economic and administrative dislocation for the State. There is no good reason to force such dislocation to provide petitioner with an unwarranted refund or, alternatively, to levy an unsought after-the-fact tax on others.

This Court, in assessing claims for particular remedies, has frequently pointed out the need to consider the impact on governmental entities. In *Milliken v. Bradley*, *supra*, for example, the Court specified that, among other things, injunctive orders "must take into account the interests of state and local authorities in managing their own affairs, consistently with the Constitution." 433 U.S. at 280-81. This admonition recognizes that even prospective orders must make a "nice adjustment and reconciliation between the public interest and private needs . . . ." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944)). In "constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable." *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973) (footnote omitted).

The standard for awarding retroactive relief against state treasuries should be, if anything, even more sensitive to concerns about "the public interest." In the first place, unlike prospective relief, retroactive relief is not necessary in order to terminate a continuing constitutional violation. This Court has long recognized that courts must have the power to bring States and their officials into compliance with the Constitution, *see, e.g.*, *Ex Parte Young*, 209 U.S. 123 (1908), even to the point of allowing federal courts to burden state treasuries otherwise protected by the Eleventh Amendment. *See Pennhurst*

State School & Hosp. v. Halderman, 465 U.S. 89 (1984); *Edelman v. Jordan*, 415 U.S. 651 (1974). But the case for imposing substantial costs on state treasuries is less compelling when future compliance has already been assured; in that case, the costs of "retroactive" compliance may outweigh any possible benefits. *See Papasan v. Allain*, 478 U.S. at 277-78.

An award of retroactive relief may also cause unique difficulties for state financial programs. *See Edelman v. Jordan*, 415 U.S. at 666 n.11 (distinguishing between effects of prospective and retroactive relief). While there is no question that prospective relief in many cases can strain limited resources, States often have options—such as withdrawing from particular programs or lowering the level of payments across the board—that may temper the impact. Those options will typically be unavailable on a retroactive basis. Moreover, because a claim for retroactive relief may accumulate over a period of several years, it may have a more drastic impact on the State treasury when it is finally presented for payment all at once.

For these reasons, it has generally been accepted that prospective and retroactive relief do not always go hand-in-hand. We have already noted, for instance, that the Eleventh Amendment has been construed to bar retroactive relief but not all prospective relief. *See Edelman v. Jordan*, *supra*. A variety of other immunities, likewise, may shield even individual defendants from damages, although injunctive relief is available to stop ongoing conduct. *See, e.g.*, *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Scheuer v. Rhodes*, 416 U.S. 232 (1974).[16]

[16] In some instances, the reverse may be true. For example, courts will typically refuse to enjoin publication of allegedly libelous material, even though a suit for damages will later lie. *See Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

An award of retroactive relief in this case unquestionably would have a severe impact on the state taxing program. In particular, even though petitioner and its *amici curiae* argue that a State must "return the unlawful taxes" (Pet. Supp. Br. at 8), or must "disgorge unconstitutionally exacted taxes" (ATA Br. as *amicus curiae* at 22), the fact is that, as a straight matter of dollars and cents, the State has nothing to "return" or "disgorge." As we have pointed out, the State did not become any richer by providing preferences for a small number of sales; rather, the State actually chose to forego revenues that it could (and, as it turned out, should) have collected.

The financial problems caused by providing refunds should be self-evident. It hardly needs saying that the State does not have available hundreds of millions of dollars in surplus funds. The revenues taken in during prior years have long since been expended on state programs, and, however much one might wish otherwise, it is not possible magically to return to the *status quo ante*. Any refunds, therefore, would have to be supplied in one of two time-honored ways: either by curtailing programs in the future or by adding new taxes. In times of increasing pressure on state resources, and resistance to the idea of increasing taxes, those proposals could not help but have an adverse effect on state finances.[17]

Petitioner and its *amici curiae* argue at length, however, that tough measures are necessary to deter state

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[17] The American Trucking Associations, Inc. (ATA Brief as *amicus curiae* at 23) appear to believe that legislatures can easily finance refunds by "new, nondiscriminatory taxes." But, at least where the refunds would amount to the great bulk of taxes paid by all taxpayers in prior years and where the newly-taxed class is very small, the State would have to multiply the tax burden several times over to obtain the needed revenues. That sort of increase is hardly a simple matter for any legislature, particularly where the higher taxes are not accompanied by any improvement in state programs or services.

legislatures from wrongful favoritism. Pet. Supp. Br. at 12-13; ATA Brief as *amicus curiae* at 19-21. According to their view, legislatures will continue to prefer local businesses unless the courts discourage such efforts through retroactive relief. While the concern is a fair one, the proposed solution, at least under the circumstances here, is way out-of-proportion to the concern.

First, we note again that, in seeking to aid local businesses, a state legislature is not doing anything intrinsically wrong. For decades, in fact, the various States have tried to attract, retain, and assist businesses by providing financial incentives, and this Court has acknowledged that these efforts may be wholly legitimate. *See Bacchus Imports, Ltd. v. Dias, supra.* Quite apart from any moral considerations, the propriety of the goal means that a legislature does not have to repeatedly defy the Commerce Clause in order to achieve its objectives. A legislature may turn to subsidies or other permissible forms of aid, rather than endlessly pursue the course of resistance envisioned by petitioner.

Second, and in any event, the level of penalty proposed as deterrence is plainly excessive. Even if a legislature explicitly announced its intention to violate the Commerce Clause, the grant of a truly minor exemption would not justify a punishment of several hundred million dollars. As petitioner would have it, a State could be forced to return all of its real property taxes if a single exemption were deemed to violate established constitutional principles, and this result would obtain despite the fact that the general tax would have been the same with or without the exemption. *See generally Texas Monthly, Inc. v. Bullock*, 109 S. Ct. at 908-09 n.3 (Scalia, J., dissenting) (listing exemptions for religious subjects). Here, as we have said, the actual harm caused by the preferences was minimal at best; by contrast, the harm caused by a vast demand on state resources would be serious and real.

Finally, it is simply untrue that, without extreme retroactive punishment, state legislatures will run unchecked. The Florida Supreme Court has proved more than willing to strike down state statutes as incompatible with the Commerce Clause, and, if petitioner truly believes that each new statute is but a copy of the last, it can seek to have its injunction extended to later statutes.[18] Timely injunctive relief would not allow petitioner to build up a claim for tax refund, but it would eliminate any real or imagined competitive disadvantage. And it is always possible that a remedy in damages may lie—at least against individual defendants—if knowing enforcement of a wrongful taxing scheme causes actual injury. See pages 17-18 *supra*.[19]

We do not believe, however, that a retroactive tax on exempted sales can reasonably be included on the list of alternative remedies. As an initial matter, it is by no means clear to us that a retroactive tax under the circumstances here would be constitutional. Retroactive legislation, of course, may be constitutional in some cases;

[18] We do not think that each Florida statute is, in fact, the same as the one before, even though the legislature has sought different ways to aid local businesses. After the decision in *Bacchus*, the legislature altered the statutory scheme to eliminate the requirement that products be made in Florida while providing preferences for products made from materials commonly (but not exclusively) grown in Florida. A subsequent statute taxed all sales at the same rate and imposed an additional tax on the act of importing alcoholic beverages into the State. 1988 Fla. Laws Ch. 88-308. A similar tax had been upheld by the Georgia Supreme Court. *See Heublein, Inc. v. Georgia*, 256 Ga. 578, 351 S.E. 2d 190 (Ga.), *appeal dismissed*, 483 U.S. 1013 (1987). Petitioner did not challenge this later statute, although it has been held invalid in a suit by a different plaintiff. *See Ivey v. Bacardi Imports, Co., supra.*

[19] We should point out that businesses engaged in interstate commerce are not always the political wallflowers that petitioner describes. Businesses with a substantial financial presence within a State often will employ lobbyists and make political contributions just as entirely local businesses do.

this Court has held that "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. . . . This is true even though the effect of the legislation is to impose a new duty or liability based on past acts." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976) (citations omitted). To satisfy due process, the Court has generally required that application of the law at issue, including the decision to make it retroactive, be supported by a rational basis. *See Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984).

The test in cases of retroactive taxation, though similar, has been set forth in somewhat different terms. In *Welch v. Henry*, 305 U.S. 134 (1938), the Court first acknowledged that "a tax is not necessarily unconstitutional because retroactive." *Id.* at 146. The Court then went on to state: "In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation." *Id.* at 147. The Court has employed a similar analysis in more recent cases. *See United States v. Hemme*, 476 U.S. 558, 568-69 (1986); *United States v. Darusmont*, 449 U.S. 292, 297-99 (1981).

We cannot say with any certainty whether a retroactive tax here would be "so harsh and oppressive" as to violate due process. But it would, in our opinion, be harsh and oppressive. Most significantly, were the State now to tax distributors on their sales of years past, those distributors would lack the power, already exercised by petitioner and others who paid the tax, to pass on the tax on such sales to the immediate purchasers. Unlike petitioner, those distributors would have to bear the full financial burden of the tax, although they themselves may have received little or no benefit from the prefer-

ences.[23] That remedy would create more inequity than it eliminated.

Although the State perhaps could now engage in a form of reverse discrimination—imposing a *higher* tax on sales of local beverages for some period—that plan would be only marginally better. In the first place, it obviously would be a remarkable distortion of the state taxing scheme, effectively requiring the State to discriminate against local businesses. And, in any event, there is no assurance that the businesses subject to this new tax would be the same as those receiving preferences under the former tax scheme several years ago or that, if they were, the disadvantages mandated by the new system would be equal to (or even close to) the advantages conferred by the old one. To impose a significantly greater tax burden on a small, vulnerable industry—whose products account for less than three percent of the market—may do far more harm than simply reverse the effects of the old tax preferences.

There might be sufficient reason to jump through one or another of these remedial hoops if either the violation here or the injury were more grave. But this case involves nothing approaching real injustice. To the contrary, this case involves a creative effort by a taxpayer to turn a small exemption for others into a huge refund for itself. The Florida Supreme Court made a correct assessment of the equities in flatly denying that claim.

[23] As we have said, *see* pages 18-19 and note 15 *supra*, the only possible effect of the preferences is to shift a small number of sales from one product (subject to full tax) to another (subject to a lesser tax). Since few (if any) distributors sell only products taxed at the preferential rates, a shift between products, even if it actually occurs, would not generally lead to greater profits for the distributors.

CONCLUSION

The judgment of the Florida Supreme Court should be affirmed.

Respectfully submitted,

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